No. 11831

United States

Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, Copartners, Doing Business Under the Fictitious Firm Name and Style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco 11-18-47—60

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

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THORNTON AND TAYLOR,
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Attorneys for Defendant and Appellee.

In the Superior Court of the State of California, in and for the County of Contra Costa

No. 38263

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, copartners doing business under the fictitious firm name and style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Plaintiffs,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a corporation,

Defendant.

COMPLAINT

The plaintiffs complain of the defendant, and for cause of action allege:

I.

That the defendant, Merchants Fire Assurance Corporation of New York, a corporation, at all times herein mentioned was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and was authorized and empowered to engage in the business of insurance of property against the risk of fire, amongst other perils, in the State of California.

II.

That the Technical Porcelain & Chinaware Company, Inc., a corporation (the original insured un-

der the policy hereinafter [1*] mentioned) was the owner of a parcel of real property situated in the City of El Cerrito, County of Contra Costa, State of California, improved with a building and which said property was being operated as a porcelain and chinaware manufacturing concern by said original insured, and that said building contained machinery and equipment, moulds, fire-fighting equipment, stores and supplies, stock, raw materials and other types of personal property at the time of its insurance and destruction by fire, as hereinafter mentioned.

III.

That on the 26th day of June, 1944, in consideration of the payment by Technical Porcelain & Chinaware Company, Inc., a corporation, to the defendant of the premium of $427.50, said defendant made its policy of insurance in writing, wherein and whereby said defendant agreed to insure the Technical Porcelain & Chinaware Company, Inc., against the risk of loss by fire in the amount of $15,000.00 on all property of every kind and description, both real and personal, including buildings, together with all of their contents of whatever nature appurtenant to the business of the assured, (excluding, however, motor vehicles, accounts, bills, currency, evidences of debt or ownership of other documents, money, notes or securities) including all property on which by the printed conditions of said policy, it is required that liability

* Page numbering appearing at foot of page of original certified **Transcript of Record.**

be specifically assumed, owned by said insured or held by it in trust or on commission, or sold, but not removed, for which said assured may be responsible, and all while contained in and/or on the premises owned and operated by said insured, and while in and/or on sidewalks, yards and open spaces, provided such property be located within 50 feet of said premises and while in and/or on cars and/or vehicles within 300 ft. of the premises situated on the east side of Kearney Street, between Schmidt and Manila Avenues, and on the premises across the street on the north side of Manila [2] between Kearney and Liberty Streets, in El Cerrito, California.

IV.

That on or about the 15th day of December, 1944, with the consent of the defendant in writing endorsed on said policy, the said Technical Porcelain & Chinaware Co., Inc., a corporation, sold, assigned and conveyed to the plaintiff its interest in the property hereinbefore referred to and in said policy of insurance.

V.

That on or prior to the 15th day of December, 1944, Antone A. Pagliero and John B. Pagliero and Arthur J. Pagliero had formed a copartnership for the purpose of taking over the assets of the Technical Porcelain & Chinaware Company, Inc., and ever since December 15, 1944, Antone A. Pagliero and John B. Pagliero and Arthur J. Pagliero have been conducting said porcelain and chinaware manufacturing concern under the fic-

titious firm name and style of Technical Porcelain & Chinaware Company, and that plaintiffs have heretofore filed with the County Clerk of the County of Contra Costa, State of California, their business certificate showing the ownership of such business after due publication thereof once a week for four successive weeks in a newspaper published in said county in the manner required by Sections 2466 and 2468 of the Civil Code of the State of California.

VI.

That on or about the 22nd day of May 1946, the said property herein referred to was partially destroyed by fire. That plaintiff was damaged thereby in the amount of $464,051.31; that at the time of said fire there was in full force and effect various policies of fire insurance with various fire insurance companies, including the defendant, in the total sum of $315,000.00; that by reason of the 90 per cent. co-insurance clause contained in all of said policies, including the policy of the defendant, plaintiff became entitled to the sum of $12,974.35 from the defendant. [3]

VII.

That after said fire and prior to July 21, 1946, the defendant denied liability on said policy of insurance, and thereby waived the benefits of the terms of said written policy of insurance requiring that proof of loss be made within sixty (60) days after the commencement of the fire, and said plaintiffs have otherwise duly performed all conditions of said policy on its part.

VIII.

That said defendant has not paid the said loss, nor any part thereof, and said amount of $12,974.35 is now due and owing from defendant to plaintiff.

IX.

That the said contract of insurance hereinabove referred to in paragraph III, was made and entered into, and was and is to be performed in the County of Contra Costa, State of California; that the obligation of said defendant, and its liability arising out of said contract of insurance, arose in said County of Contra Costa, State of California.

X.

The Mechanic's Bank of Richmond, is named in said written policy of insurance under the "Lender's Loss Payable Endorsement" as a payee; that on October 18, 1946, said Mechanic's Bank of Richmond executed and delivered to plaintiff a written assignment of all rights of said lender payee under said policy.

Wherefore, plaintiffs pray judgment against defendant in the sum of $12,974.35, with interest from the date of said fire, costs incurred herein, and for such other and further relief as to the Court may seem meet and proper in the premises.

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs.

State of California,
County of Contra Costa—ss.

Antone A. Pagliero, being first duly sworn, deposes and says:

That he is one of the partners of the firm of Technical Porcelain & Chinaware Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

/s/ ANTONE A. PAGLIERO.

Subscribed and sworn to before me this 18th day of October, 1946.

[Seal] LILLIAN W. CHASE,
Notary Public in and for the County of Contra Costa, State of California.

(Here follow certified copies of Petition for Removal of Cause to the United States District Court, in and for the Northern District of California, Southern Division; Memorandum of Points and Authorities in Support of Petition for Removal to the United States District Court; Bond on Removal; Notice of Petition for Removal and Order for Removal of Cause to the United States District Court, in and for the Northern District of California, Southern Division, and Certificate to above copies.)

[Endorsed]: Filed Dec. 20, 1946, C. W. Calbreath, Clerk.

In the United States District Court, in and for the Southern Division of the Northern District of California

No. 26704S

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, copartners doing business under the fictitious firm name and style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Plaintiffs,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a corporation,

Defendant.

ANSWER TO COMPLAINT

Comes now the defendant Merchants Fire Assurance Corporation of New York and answering the complaint on file admits, denies and alleges as follows:

I.

Defendant admits the allegations of Paragraphs I, III and IX of said complaint.

II.

Answering Paragraphs II, IV, V and X, defendant alleges that it has not sufficient information or belief to answer said allegations more particularly, and therefore and upon that ground it denies

the said allegations, save and except it admits said bank was named as a loss payee in said policy and that there is an endorsement indicating an assignment of interest.

III.

Answering Paragraph VI, defendant denies the allegations thereof, save and except it is admitted a fire occurred at said [6] premises on May 22, 1946, causing damage in the amount of $464,051.31, that there was $300,000 insurance in effect at said time and that each policy of insurance contained a 90% Average clause.

IV.

Answering Paragraph VII, defendant denies the said allegations. In this respect defendant alleges that in July, 1946, it informed plaintiffs that it appeared plaintiffs had taken out other insurance in substitution of defendant's policy and that defendant reserved whatever rights and defenses it had or such as might thereafter accrue to it; that thereafter and on July 23, 1946, plaintiffs filed a purproof of loss with defendant and defendant immediately advised plaintiffs that same was defective and too late.

V.

Answering Paragraph VIII, defendant denies that the said sum of $12,974.35, or any other sum is due and owing from it. Admits that it has not paid any part of said loss.

And as and for a separate and distinct and first affirmative defense, defendant alleges:

I.

That on or about April 10, 1946, plaintiffs through Otis & Browne, Inc., their brokers and duly authorized agents, obtained a policy of insurance in the Home Fire and Marine Insurance Company in the amount of $15,000.00 in substitution for and in lieu of defendant's said policy; that thereupon defendant's policy was cancelled and terminated; that defendant is informed and believes that plaintiffs made claim and received payment under the policy of Home Fire and Marine Insurance Company for said loss.

And as and for a separate and distinct and second affirmative defense, defendant alleges:

I.

That in and by the defendant's policy of insurance it was and is provided as follows:

> "Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and [7] sworn to by him setting forth: (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss

thereon; (d) all incumberances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

* * * * * * *

Time for Commencement of Action. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen month. . . ."

II.

That the loss to plaintiff's property occurred on May 22, 1946; that plaintiffs failed to present proofs of loss to defendant within sixty days thereof, as in said policy provided; that plaintiffs presented a purported proof of loss to defendant on July 23, 1946, and were promptly advised by defendant that same was defective and delinquent;

Wherefore, defendant having fully answered, prays that it have judgment, that it recover its

costs and have such other and different relief as may be proper.

/s/ E. M. TAYLOR,
/s/ H. A. THORNTON,
THORNTON & TAYLOR,
Attorneys for Defendant,
Merchants Fire
Assurance Company.

Receipt of a copy of the foregoing Answer is acknowledged this 23rd day of December, 1946.

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 23, 1946.

[Title of District Court and Cause.]

STIPULATION AS TO ISSUES OF FACT

It is hereby stipulated by and between the parties hereto, through their respective counsel, that each and every and all of the allegations contained in paragraphs I, II, III, IV, V, IX and X of plaintiff's complaint on file herein are true and correct, and it is further stipulated that no evidence to support said allegations need be offered at the trial of said cause.

With respect to paragraphs VI, VII and VIII of plaintiffs' complaint on file herein, it is hereby stipulated as follows:

(a) (With respect to paragraph VI) That on or about the 22d day of May, 1946, the said property herein referred to was partially destroyed by fire. That plaintiffs were damaged thereby in the amount of Four Hundred Sixty-four Thousand and Fifty-one and 31/100 ($464,051.31) Dollars; that at the time of said fire there were in full force and effect various policies of fire insurance, with various fire insurance companies, excluding the defendant, in the total sum of Three Hundred Thousand ($300,000) Dollars; that plaintiffs contend and defendant denies that at the time of said fire there was in full force and effect (and in addition to the insurance in the amount of Three Hundred Thousand ($300,000) Dollars), a policy of the defendant to the plaintiffs in the amount of Fifteen Thousand ($15,000) Dollars. That by reason of the 90% co-insurance clause contained in all said policies, including the policy of the defendant, if the Court should hold said policy of defendant in effect, plaintiffs, if entitled to judgment against defendant, would be entitled to judgment in the amount of Twelve Thousand Nine Hundred Seventy-four and 35/100 ($12,974.35) Dollars.

(b) (With respect to paragraph VII) That after said fire and prior to July 21st, 1946, the defendant denied liability on said policy of insurance. [9]

(c) (With respect to paragraph VIII) That the defendant had not paid the said loss, nor any part thereof, to plaintiffs.

It is further stipulated by and between the parties hereto as follows:

1. That on July 23, 1946, plaintiffs presented to and filed with defendant a verified proof of loss under its policy #8604.

2. That on or about July 25, 1946, defendant informed plaintiffs in writing that said proof of loss was defective and that it had not been presented to defendant within the time required by said policy.

3. That at all times from February 6, 1945, to July 23, 1946, and thereafter, Otis & Browne, Inc., were acting as insurance brokers for plaintiffs.

4. That on April 10, 1946, Otis & Browne, Inc. received a request in writing from defendant to cancel and return defendant's said policy.

5. That upon receipt of said Notice, Otis & Browne, Inc., thereupon obtained a policy of fire insurance from the Home Fire & Marine Insurance Co. in the amount of $15,000 insuring plaintiffs on its said property for the term from April 10, 1946, to 1949.

6. That thereafter and on May 3, 1946, defendant in writing again requested Otis & Browne, Inc., to return its said policy.

7. That in reply thereto, Otis & Browne, Inc., informed defendant in writing on May 7, 1946: "You may close your file as this has been replaced as of April 10-1946. Policy is at Mechanics Bank, Richmond and will require some time to secure unless you wish to send cancellation notice dated 10 days prior to April 10-1946."

8. That following the fire of May 22, 1946, plain-

tiffs made claim for and collected under said policy of the Home Fire & Marine Insurance Co., the sum of $12,974.35. [10]

That the sole issues involved in the pending action are as follows:

1. The extent of the authority of Otis & Browne, Inc., as insurance brokers for plaintiff.

2. The legal effect of the acts and conduct of Otis & Browne, Inc., in obtaining a policy of insurance in a similar amount on the same property with the Home Fire & Marine Insurance Co., after their receipt of defendant's request for cancellation of its policy.

3. The legal effect of plaintiffs' having made claim for and having collected the full amount due under the said policy of the Home Fire & Marine Insurance Co.

The foregoing stipulation shall, however, be subject to all pertinent legal objections to admissibility of any of the above matters, which may be interposed at the trial by either party.

Dated: April 17th, 1947.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs.

/s/ H. A. THORNTON,
/s/ EVANS M. TAYLOR,
THORNTON & TAYLOR,
Attorneys for Defendant
Insurance Company.

[Endorsed]: Filed April 18, 1947 [11]

In the United States District Court in and for the Southern Division of the Northern District of California

No. 26704 L

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, Copartners, doing business under the fictitious firm name and style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Plaintiffs,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a corporation,

Defendant.

OPINION AND ORDER

The pressure of a heavy calendar prevents my writing an extended opinion in this case. There is due counsel, however, a brief statement of my conclusions.

Although there is evidence in the case which I believe will sustain a finding that Otis & Browne were general agents for the plaintiffs and as such were empowered to agree to cancellation of a policy or to effect a substitution of one policy for another, it seems to me that this case can be readily disposed of upon another ground. I believe that the facts impel a conclusion that there was a substitution of policies. Whether the agents had or did not

have authority to substitute at the time of the substitution, it very clearly appears to me that there has been ratification of the act of the agents.

Admittedly plaintiffs were informed of the substitution after the fire and prior to their making a [12] claim against the Home Fire Insurance Co. It was clearly the intent and purpose of Otis & Browne at the time they obtained the policy of the Home Fire Insurance Co. to substitute that in place of the policy here in question. With knowledge of that fact communicated to them by Otis & Browne they made claim against the Home Fire Insurance Co. and accepted payment from that company. This, to my notion, was a clear ratification of the act of substitution. The case of Finley v. New Brunswick Fire Insurance Co., 193 Fed. 195, appears to me to be directly in point and the attempts made by counsel to differentiate that cases are not persuasive because the differentiations would have no effect upon the result reached. I am also very strongly persuaded by the law of the forum found in Strauss v. Dubuque Fire & Marine Insurance Co., 132 Cal. App. 283.

Judgment will be for the defendant, findings to be prepared in accordance with the local rule.

Dated: October 16th, 1947.

DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed October 16, 1947. [13]

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED FINDING OF FACT

Amendment No. 1.

That it is true that the Technical Porcelain & Chinaware Company, Inc., a corporation, was the original insured under the policy referred to in the complaint and was the owner of the property described therein; that on the 26th day of June, 1944, in consideration of the payment by said corporation to defendant of a premium of $427.50 defendant issued to said corporation its policy of fire insurance in the amount of $15,000 for the term from June 26th, 1944, to June 26th, 1947, as more particularly described in the complaint; that on or about the 15th day of December, 1944, with the consent of the defendant in writing [14] endorsed on said policy, said corporation sold, assigned and conveyed to plaintiffs its interest in the property referred to in said complaint and its interest in said policy of insurance.

Amendment No. 2.

That it is true that on or about the 22d day of May, 1946, the said property described in the complaint was partially destroyed by fire; that the said property had an actual cash value at the time of the fire in the amount of $596,113.77; that as the result of said fire, plaintiffs were damaged in the amount of $464,051.31; that at the time of said fire

there were in full force and effect various policies of insurance with various fire insurance companies, excluding defendant, in the total sum of $300,000; that in each of said policies, as well as in the policy of defendant, there was and is a provision reading as follows:

> "It is expressly stipulated and made a condition of the contract that, in event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to ninety per cent (90%) of the actual value of the property described herein at the time such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

Amendment No. 3.

That it is true that after said fire and prior to July 21st, 1946, defendant denied liability on said policy of insurance and waived the necessity of the filing of a proof of loss by plaintiffs with defendant; that plaintiffs have duly performed all conditions of said policy on their part to be performed; that said defendant has not paid the sum of $12,974.35 claimed by plaintiffs from defendant.

Amendment No. 4.

That it is true that on or about May 3d, 1946, defendant wrote to Otis & Browne, Inc., as follows:

> "We are following up a letter written to you on April 10 asking for cancellation of this policy. [15]

"We understood that you were going to relieve us of liability as soon as possible although no definite date was set for the termination.

"Will you kindly follow this up and endeavor to have our policy returned within the next ten days?"

That in reply thereto, Otis & Browne, Inc., wrote to defendant as follows:

"You may close your file as this has been replaced as of April 10 - 1946. Policy is at Mechanics' Bank Richmond and will require some time to secure unless you wish to send cancellation notice dated 10 days prior to April 10 - 1946."

Amendment No. 5.

That it is true that Otis & Browne, Inc., did not inform plaintiffs of defendant's request until about a week or ten days after said fire, whereupon plaintiffs stated to Otis & Browne, Inc., that plaintiffs accordingly were covered by insurance in the amount of $315,000 instead of $300,000.

Amendment No. 6.

That is is not true that the acts of Otis & Browne, Inc., in purporting to secure another policy in place of that of defendant, were performed within the scope and authority of their employment as plaintiffs' insurance brokers.

Amendment No. 7.

That it is true that Otis & Browne, Inc., had neither general authority, nor authority of any kind, to accept notice of cancellation or termination of the policy of defendant, nor of any other policy of insurance; that in their reply to defendant's letter of May 3d, 1946, suggesting to defendant that:

> ". . you (defendant) wish to send cancellation notice . ."

Otis & Browne, Inc., specifically informed defendant that they had no such authority.

Respectfully submitted,

HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs.

Receipt of a copy of the within Plaintiffs' Proposed Amendments to Defendant's Proposed Findings of Fact is admitted this 29th day of October, 1947.

THORNTON & TAYLOR,
Attorneys for Defendant.

[Endorsed]: Filed October 29, 1947. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on Wednesday, September 17th, 1947, on the issues raised by the Complaint, the Answer thereto of defendant, as presented by the Requests for Admissions, the Answers thereto and particularly by the Stipulation as to Issues of Fact on file herein, Hauerken, Ames & St. Clair by George H. Hauerken appearing for plaintiffs, and Thornton & Taylor by Evans M. Taylor appearing for defendant, and evidence, oral and documentary, having been introduced, and after argument on briefs the cause having been submitted to the Court for decision, a jury having been waived, and the Court having considered the evidence and the law, and being fully advised, now makes and files its findings of fact and conclusions of law as follows: [17]

Findings of Fact

I.

That it is true that all times mentioned in the complaint the defendant was and is a foreign corporation transacting the business of insurance in the State of California;

II.

That it is true that at the times mentioned in the complaint Technical Porcelain & Chinaware Co., Inc., a corporation, owned the property therein

described; that on or about June 26, 1944, for the premium therein mentioned, defendant issued to said company its said policy of fire insurance thereon in the amount of $15,000.00 for the term from June 26, 1944, to June 26, 1947, and that on or about December 15, 1944, said Technical Porcelain & Chinaware Co., a corporation, transferred said property and said policy to plaintiffs and that an endorsement to that effect was attached to said policy of insurance;

III.

That it is true that the Technical Porcelain & Chinaware Company, Inc., a corporation, was the original insured under the policy referred to in the complaint and was the owner of the property described therein; that on the 26th day of June, 1944, in consideration of the payment by said corporation to defendant of a premium of $427.50 defendant issued to said corporation its policy of fire insurance in the amount of $15,000 for the term from June 26th, 1944, to June 26th, 1947, as more particularly described in the complaint; that on or about the 15th day of December, 1944, with the consent of the defendant in writing endorsed on said property, said corporation sold, assigned and conveyed to plaintiffs its interest in the [18] property referred to in said complaint and its interest in said policy of insurance;

IV.

That it is true that ever since said time and up to the time of the fire hereinafter referred to,

plaintiffs were doing business as a co-partnership under the fictitious name of Technical Porcelain & Chinaware Co. and had filed the certificates of ownership required by sections 2466 and 2468 of the Civil Code of California;

V.

That it is true that on or about the 22nd day of May, 1946, the said property described in the complaint was partially destroyed by fire; that the said property had an actual cash value at the time of the fire in the amount of $596,113.77; that as the result of said fire, plaintiffs were damaged in the amount of $464,051.31; that at the time of said fire there were in full force and effect various policies of insurance with various fire insurance companies, excluding defendant, in the total sum of $300,000; that in each of said policies, as well as in the policy of defendant, there was and is a provision reading as follows:

> "It is expressly stipulated and made a condition of the contract that, in event of loss, this company shall be liable for no greater proportion thereof than the amount hereby insured bears to ninety per cent (90%) of the actual value of the property described herein at the time such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

IV.

That it is true that in and by defendant's said

policy The Mechanics Band of Richmond is named under a Lenders Loss Payable Endorsement; that it is true that said [19] bank transferred its rights, if any, thereunder to plaintiffs;

VII.

That it is true that at all times from February 6, 1945, to July 23, 1946, and thereafter Otis & Browne, Inc., were acting as insurance brokers for the plaintiffs, and during all said times handled plaintiffs' entire insurance portfolio; that it is true that defendant had been informed prior to said fire that Otis & Browne were plaintiffs' insurance brokers;

VIII.

That it is true that on or about April 10, 1946, defendant wrote to Otis & Browne, Inc., as follows:

> "Will you kindly cancel this policy and return it to us for pro rata cancellation? The company has requested us to retire from the liability because we are no longer willing to accept this classification. If you prefer, we can send cancellation notice direct to the assured. However, we will not do so unless you specifically instruct us."

IX.

That it is true that Otis & Browne received said letter and thereupon obtained a policy of fire insurance with the Home Fire & Marine Insurance Company in the amount of $15,000.00 on plaintiffs'

said property, effective from April 10, 1946, to [20] April 10, 1949, and which policy was obtained for the purpose of replacing defendant's policy;

X.

That it is true that thereafter and on or about May 3, 1946, defendant again wrote to Otis & Browne about being relieved of liability; that it is true that Otis & Browne in reply and on or about May 7, 1946, informed defendant that its said policy had been replaced on April 10, 1946, and that the defendant could close its file;

XI.

That it is true that after the fire of May 22, 1946, Otis & Browne informed plaintiffs that they had obtained a policy for a similar amount with the Home Fire & Marine Insurance Company, to replace defendant's policy; that it is true that thereupon plaintiffs made claim for and collected the full amount due under the said policy of the Home Fire & Marine Insurance Company, and also made claim against this defendant for a like amount, and as to which defendant denied liability;

XII.

That it is true that the acts of Otis & Browne, Inc., in substituting another policy for that of defendant were performed within the scope and authority of their employment as plaintiffs' insurance brokers;

XIII.

That it is true that defendant waived the necessity for plaintiffs' filing a proof of loss. And that the defendant has denied liability on said policy and has not paid the sum of $12,974.35 claimed by plaintiffs from defendant;

XIV.

That all of the allegations of plaintiffs' Complaint inconsistent with the foregoing findings are untrue.

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

I.

That prior to the fire the defendant's policy of insurance [21] was replaced by another one, obtained as a substitution therefor;

II.

That following the fire plaintiffs, upon being informed as to the facts, ratified the acts of their brokers and the replacement and substitution of defendant's policy of insurance by one in another insurance company;

III.

That at the time of the fire liability under defendant's policy of insurance had been terminated by said policy having been replaced by one with another insurance company;

IV.

That plaintiffs are not entitled to recover from defendant under its said policy of insurance except they are entitled to the sum of $190.25 as and for the unearned return premium, plus interest thereon at 7% per annum from April 10, 1946, to September 17, 1947, in the amount of $19.11 as heretofore tendered them by defendant.

V.

That the defendant Merchants Fire Assurance Corporation, a corporation, is entitled to judgment and for its costs of suit.

Judgment is hereby ordered to be entered accordingly.

Dated: November 5th, 1947.

DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Nov. 5, 1947. [22]

In the United States District Court in and for the Southern Division of the Northern District of California

No. 26704-L

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, Copartners, Doing Business Under the Fictitious Firm Name and Style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Plaintiffs,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a Corporation,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial on Wednesday, September 17, 1947, before the above-entitled Court, sitting without a jury, a jury having been waived, the action was then heard on the complaint, the answer thereto of defendant, and the Stipulation as to Issues of Fact, Hauerken, Ames & St. Clair by George H. Hauerken appearing for plaintiff, and Thornton & Taylor by Evans M. Taylor, appearing for the defendant, and evidence, both oral and documentary, having been introduced and the parties having rested, and the cause having been fully argued on briefs and being thereupon submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of facts and conclusions of law, and being fully advised: [23]

Wherefore, by reason of the law and the findings of fact aforesaid, it is ordered, adjudged and decreed:

(1) That the plaintiffs take nothing by reason of said complaint, other than that adjudged in paragraph 3 following.

(2) That the defendant do have and recover of and from plaintiffs their costs of suit herein in the amount of $

(3) That plaintiffs do have and recover of defendant the sum of $190.25 as and for the unearned return premium, plus interest thereon at 7% per annum from April 10, 1946, to September 17, 1947, in the amount of $19.11 as heretofore tendered them by defendant.

Dated: November 5th, 1947.

DAL M. LEMMON,
Judge of the United States
District Court.

[Endorsed]: Filed and Entered Vol. V.—Pg. 283, November 5, 1947. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that Antone A. Pagliero, John B. Pagliero and Arthur J. Pagliero, copartners, doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action in favor of defendant and against plaintiffs on the 5th day of November, 1947, and from each and every part thereof.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Dec. 4, 1947. [25]

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS RELIED UPON ON APPEAL

In accordance with the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, appellants hereby state the points upon which they intend to rely on appeal:

(1) The court erred in finding and holding that the acts of Otis & Browne, Inc., "in substituting another policy for that of defendant," were performed within the scope and authority of their employment as plaintiffs' insurance brokers, for the following reasons:

(a) There is no evidence in the record tending to show that Otis & Browne, Inc., were specifically authorized to do said acts. [26]

(b) There is no evidence in the record tending to show that Otis & Browne, Inc., were generally authorized to do said acts.

(c) There is no evidence in the record tending to show that Otis & Browne, Inc., were general insurance agents for plaintiffs. On the contrary, the only evidence in the record shows that Otis & Browne, Inc., were only insurance brokers for plaintiffs. As such, and without prior additional authority, they were not authorized to do said acts.

(2) The court accordingly erred in admitting in evidence defendant's Exhibits B and C, as these exhibits were not shown to have been sent by defendant to an agent of plaintiffs authorized to receive and act upon them.

(3) The court erred in finding and holding that plaintiffs "ratified the acts of their brokers and the replacement and substitution of defendant's policy of insurance by one in another insurance company."

(4) The court erred in finding and holding that defendant's policy of insurance was replaced by another policy, obtained as a substitution therefor, for the reason that there is no so-called doctrine of substitution in the law of insurance, that name being used only to describe a variety of situations, none of which is like that presented in this case.

(5) Assuming a so-called doctrine of substitution to exist in the law of insurance, the court erred in applying that doctrine to the facts of the present case, for the reason that it is not applicable to those facts.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs and
Appellants.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Dec. 15, 1947. [27]

[Title of District Court and Cause.]

STIPULATION AS TO REPORTER'S TRANSCRIPT ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective counsel, and pursuant to Rule 21 of the rules of the above-entitled Court, that one copy only of the Reporter's transcript of the above-entitled action need be filed with the above-entitled Court for the purpose of the preparation of the record on appeal.

Dated: December 12, 1947.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs and Appellants.
E. M. TAYLOR,
THORNTON & TAYLOR,
Attorneys for Defendant and Appellee.

[Endorsed]: Filed December 15, 1947. [28]

[Title of District Court and Cause.]

STIPULATION AND ORDER AS TO TRANSMISSION OF EXHIBITS TO UNITED STATES CIRCUIT COURT OF APPEALS

It is hereby stipulated by and between the parties hereto, through their respective counsel, and

pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, that the following exhibits on file herein, to wit plaintiffs' Exhibits No. 1 and No. 2 and defendant's Exhibits B and C, need not be copied into the record on appeal, but that the original of said exhibits may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, to be inspected by said Circuit Court of Appeals, and that said original exhibits may be deemed a part of the record on appeal in the above-entitled action.

Dated: San Francisco, California, this 12th day of December, 1947.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs and Appellants.

EVANS M. TAYLOR,
THORNTON & TAYLOR,
Attorneys for Defendant and Appellee.

It is so ordered.

Dated: San Francisco, California, this 15th day of December, 1947.

DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed December 15, 1947. [30]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL.

In accordance with the provisions of Rule 75 of the Federal Rules of Civil Procedure, plaintiffs and appellants, Antone A. Pagliero, John B. Pagliero and Arthur J. Pagliero, copartners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company, having appealed from the judgment entered against them and in favor of defendant and appellee, Merchants Fire Assurance Corporation of New York, a corporation, in the above-entitled action by the above-entitled court, to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designate the following portions of the record, proceedings and evidence in said action [31] as the portions of such record, proceedings and evidence to be contained in the record on appeal:

(1) Complaint.
(2) Answer.
(3) Stipulation As To Issues Of Fact.
(4) Findings Of Fact And Conclusions Of Law.
(5) Plaintiffs' Proposed Amendments To Defendant's Proposed Findings Of Fact.
(6) Opinion And Order.
(7) Judgment.
(8) Notice Of Appeal.
(9) Appellants' Statement Of Points Relied Upon On Appeal.

(10) The copy of the entire Reporter's transcript of the evidence and proceedings at the trial, certified by the official Reporter of the above-entitled court, who stenographically reported and transcribed such evidence and proceedings, and heretofore filed with the Clerk of the above-entitled court.

(11) Stipulation As To Reporter's Transcript On Appeal.

(12) The following original exhibits, to wit plaintiffs' Exhibits No. 1 and No. 2 and defendant's Exhibits B and C, in accordance with the Stipulation And Order As To Transmission Of Exhibits To United States Circuit Court Of Appeals on file herein.

(13) Stipulation And Order As To Transmission Of Exhibits To United States Circuit Court Of Appeals.

(14) This Designation Of Portions Of Record, Proceedings, And Evidence To Be Contained In Record On Appeal.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Plaintiffs and
Appellants.

Receipt of a copy of the foregoing designation is hereby admitted this 12th day of December, 1947.

THORNTON & TAYLOR,
Attorneys for Defendant and
Appellee.

[Endorsed]: Filed December 15, 1947. [32]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Antone A. Pagliero, et als., Plaintiffs, vs. Merchants Fire Assurance Corporation of New York, a corporation, Defendant, No. 26704L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.50 and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of January A. D. 1948.

[Seal] /s/ C. W. CALBREATH,
Clerk.

In the United States District Court for the Southern Division of the Northern District of California

No. 26704S

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, copartners doing business under the fictitious firm name and style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Plaintiffs,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a corporation,

Defendant.

Before: Hon. Dal M. Lemmon, Judge.

REPORTER'S TRANSCRIPT

San Francisco, California,
Wednesday, September 17, 1947

Appearances:

For the Plaintiffs: George H. Hauerken, Esq., Russ Bldg., San Francisco 4, Calif.

For the Defendant: Evans M. Taylor, Esq., 311 California Street, San Francisco 4, Calif.

The Clerk: Pagliero vs. Merchants Fire Assurance Corporation for trial.

Mr. Hauerken: That is ready.

Mr. Taylor: Ready.

The Court: I take it from the stipulation as to facts that the scope of the evidence to be offered

in the trial of this case today is restricted and confined to the extent of the authority of the insurance brokers and the legal effect of the acts of the insurance brokers.

Mr. Hauerken: Yes.

Mr. Taylor: That is correct.

Mr. Hauerken: Yes, your Honor, the original stipulation, I assume, is on file.

Mr. Taylor: April 17, 1947.

Mr. Hauerken: That stipulation is on file. That is true, your Honor, that is, that the issues are confined to the legal effect of the conduct and the authority of the broker.

The Court: Before we took up any of the legal problems involved I wanted to confine the scope of the evidence to be received today if there were any limits that counsel were in a position to agree on. So with that understanding you may proceed to submit your evidence as to the scope of his authority. [2*]

Mr. Hauerken: I think at the outset, your Honor, so that the Court will have before it certain documentary evidence and a further stipulation that has been entered into, I would like to offer in evidence the original policy of the Merchants Fire Assurance Corporation, the defendant herein, as the plaintiffs' first in order.

(The document referred to was marked plaintiffs' Exhibit No. 1.)

Mr. Hauerken: Then inasmuch as the policy provides that loss, if any, is payable to the Me-

*Page numbers appearing at top of page of Reporter's Certified Transcript of Record.

chanics Bank of Richmond and the policy holder, as their interests may appear, I now offer in evidence the original assignment to the Mechanics Bank of Richmond.

The Court: That has been stipulated to, has it not?

Mr. Taylor: It has, your Honor, but may I say this: while we agreed on the facts I did not want the record to show it had been stipulated without some proof being offered on that score.

The Court: Of course, the efficacy of the stipulation is to do away with the necessity of proof, but if you want it, let it go in.

(The document referred to was marked plaintiffs' Exhibit No. 2.)

Mr. Hauerken: Then there is just one other point—[3] not covered, inadvertently—and that is in paragraph 7 of the complaint there is an allegation that plaintiff has otherwise duly performed all conditions of said policy on its part.

Now counsel have agreed to stipulate that the plaintiffs have otherwise duly performed all conditions of the policy on its part with this exception: It is alleged—in the stipulation of facts there is a provision that after said—you will find this on page 2 of the stipulation, line 17—"that after said fire and prior to July 21, 1946, the defendant denied liability on said policy of insurance."

Now the effect of that—the fire happened on May 22, 1946, and there is a 60 day provision for filing proof of loss—the effect of that, and there

are a legion of California cases on the subject that if an insurance company denies liability the filing of a proof of loss is an idle act and need not be done. Mr. Taylor has stipulated they have denied liability within the 60 day period; accordingly we take the position that the filing of a proof of loss is something which is done just as a matter of courtesy or out of an abundance of caution.

Mr. Taylor, I suppose, has some point he may want to raise on that, and I wanted to explain that. At any event, there is that stipulation that the plaintiffs have performed all the conditions of said policy on their part except that [3] a proof of loss was filed on July 23.

The Court: I thought because of your stipulation you made no point of that.

Mr. Hauerken; I think he has abandoned that.

Mr. Taylor: Yes, that may be passed.

Mr. Hauerken: On that point, I take it, the plaintiff has no evidence to offer and we may go to the affirmative defense of the defendant on the matter of whether—Mr. Taylor supoenaed Otis & Browne to be here—they were the insurance brokers. I talked to Mr. Browne yesterday and he assured me he would be here at ten, and I talked to him about nine o'clock this morning and he said he would be here at ten minutes to ten. I cannot understand why he is not here on time.

The Court: Did you definitely tell him what court to come to?

Mr. Hauerken: Yes, I told him Room 307 in the Post Office Bldg., Seventh and Mission.

Mr. Pagliero is here and I—Here is Mr. Browne right now.

Mr. Taylor: Mr. Browne, will you take the stand, please. [4]

EDWARD RAMBO BROWNE

called by the defendant, Sworn.

Mr. Hauerken: If your Honor please, I would like to say this just before we proceed: Your Honor will notice in the last paragraph of the stipulation that "The foregoing stipulation shall, however, be subject to all pertinent legal objections to the admissibility of any of the above-mentioned matters, which may be interposed at the trial by either of the parties, and I do want to interpose some legal objections as to the relevancy of some of the matters referred to, those affirmative matters that are contained therein on the part of the defendant, and I should like—let us say offer the stipulation subject to motions to strike at the conclusion of the evidence, so that your Honor may have all the evidence. For instance, I make this point: the policy of fire insurance contains a clause, and there is no dispute on this at all, that if the insurance company wants to cancel the policy it may do so by a five day written notice to the policy holder.

Now admittedly that was not done in this case.

There are California cases that hold that a course of conduct with an insurance broker with respect to matters of this nature are simply not in point if the—as a matter of fact, the policy must be strictly complied with or that is all there is to it. [5]

(Testimony of Edward Rambo Browne.)

The Court: There isn't any occasion for your objections. You have stipulated to facts here that you apparently have agreed upon, but the effect and sufficiency of those points are legal problems to be considered.

Mr. Hauerken: I would like to suggest that the stipulation be accepted subject to our right—probably your Honor will want us to file briefs at the conclusion of the trial—it is a very interesting and rather unique point of law; there are not many cases on the subject. May the stipulation be received subject to our right to object to the sufficiency——

The Court: I think you always have that right if the proof does not measure up to the facts.

Mr. Hauerken: The proof will measure up to the facts. It is just a question of the relevancy.

The Court: There is no question as to the facts being true; it is just a question of the legal sufficiency.

Mr. Hauerken: Yes. I just wanted to state my position on that.

Direct Examination

By Mr. Taylor:

Q. Mr. Browne, your name is Edward Rambo Browne? A. Yes.

Q. And you are president——

If your Honor please, I am calling this witness under Section 45 (b) of the Federal Rules of Procedure.

(Testimony of Edward Rambo Browne.)

And you are president of Otis & Browne, Incorporated? A. Yes.

Q. And your business is and for *some has* been been that of insurance brokers, is that right?

A. I am the third generation in this city.

Q. You were served with a subpoena duces tecum for the production of certain documents, were you not? A. Yes.

Q. Did you bring a document with you pursuant to the service of that subpoena dated on or about December 14, 1944, that had been addressed to you by the plaintiffs in this case with respect to your acting as an insurance broker?

A. I have no such document.

Q. You have no such document? A. No.

Q. Did you bring with you a document or letter dated on or about February 5, 6 or 7 addressed to you by the plaintiffs in this case with respect to your acting as an insurance broker?

A. No, I have no such document.

The Court: You mean by that that you haven't those documents here or they do not exist?

A. They do not exist, your Honor.

Q. (By Mr. Taylor): You are familiar—if I may just [7] shorten this—you are familiar with the documents requested in that subpoena. Did you bring any of the documents requested?

A. I brought the last mentioned documents in the subpoena there on the table by my hat, and they consist of insurance policies and a letter.

Q. But nothing with respect to any communica-

(Testimony of Edward Rambo Browne.)

tion from the plaintiffs individually or as a co-partnership under the name of Technical Porcelain & Chinaware Company, or from Technical Porcelain & Chinaware Company, a corporation, with respect to your acting as broker?

A. We never received any communication from them; just individually——

Mr. Taylor: Just a moment. I ask that the answer go out as not responsive.

The Court: It may go out.

Mr. Taylor: If your Honor——

Q. Answer the question directly. You didn't bring any such documents?

A. I didn't have them to bring.

Q. You made a search for them, did you?

A. I never received such a document.

Q. Will you answer the question?

May the answer go out?

Did you make a search for that record? [8]

A. I have gone through the records extremely carefully and there is no such document and I assure you there is no such document.

Mr. Taylor: I ask that the last part of the answer go out as not responsive.

The Court: "I assure you there is no such document" may go out.

Mr. Taylor: That is all from this witness right now, if your Honor please.

Mr. Hauerken: No questions.

Mr. Taylor: Mr. Ritch.

FLETCHER QUINN RITCH

called for the defendant, Sworn.

Direct Examination

By Mr. Taylor:

Q. Mr. Ritch, what is your business?

A. What?

Q. What is your business?

A. I am one of the underwriters at the Merchants Fire Assurance Company of New York.

Q. And how long have you been with the Merchants Fire Assurance Company, the defendant in this case?

A. It will be four years—five years next October.

Q. You were then with them in December of 1944? A. I was. [9]

Q. And have been continuously with them from that date to the present date? A. I have.

Q. Calling your attention to the time of on or about February 6, 1945, and with respect to the policy number 8604 which is the subject of this action, did you have any occasion to have any communication or contact with Otis & Browne with regard to that policy? A. I did, yes.

Q. When did that contact occur?

A. At the time of the fire, around about February 7, 1945, some one—Mr. Browne or some one in his office came in with a letter authorizing them to act as brokers.

Mr. Hauerken: Just a moment. I submit the answer is not responsive, your Honor.

(Testimony of Fletcher Quinn Ritch.)

The Court: Yes. It is beyond the scope of the question.

Q. (By Mr. Taylor): Let me ask you this, Mr. Ritch, on or about February 6 of 1945 you had contact with Otis & Browne with respect to this policy, did you? A. I did, yes.

Q. Did they present any document to you at that time with reference to the subject policy?

A. A letter signed by Mr. A. A. Pagliero, as near as I can recall. [10]

Q. Did you make any notation at that time with regard to such a letter?

A. I made a notation on that copy of our policy called the daily report.

Q. Have you got that with you?

A. I have.

Q. Will you let me see that, please?

A. (The witness produces document.)

Q. This document that you have handed me is the daily report or company record of this policy that the Merchants had issued to the plaintiffs in this case, is that right? A. Yes, sir.

Q. Number 8604, and the original policy having been introduced in evidence as Plaintiffs' Exhibit No. 1, will you examine that daily report——

The Court: Has counsel seen it?

Mr. Hauerken: I have not seen it, no. I would like to see this just a moment.

(The document was exhibited to Mr Hauerken.)

(Testimony of Fletcher Quinn Ritch.)

Q. (By Mr. Taylor): Will you examine that daily report, please——

And I will ask this be marked defendant's exhibit for identification.

(The document referred to was marked Defendant's Exhibit A for Identification.) [11]

Mr. Hauerken: That was offered for identification only?

Mr. Taylor: Yes, it was, Mr. Hauerken.

Q. I will ask you to examine what has been marked Defendant's Exhibit A for Identification, Mr. Ritch, and show me where on that document you made such a notation as to such a letter as you referred to from Otis & Browne.

A. A notation in pencil on the right-hand corner —not corner, but side of the daily report made at that time.

Q. What does your memorandum in that respect state?

A. "Letter signed by A. A. Pagliero to recognize Otis & Browne, Incorporated, as their brokers."

Q. And does that refresh your recollection as to that letter which was presented to you by Otis & Browne at that time?

A. The regular letter stating that they were to be their insurance brokers.

Q. At that time did Otis & Browne present to you anything else with respect to such policy?

A. Two endorsements.

(Testimony of Fletcher Quinn Ritch.)

Q. Two endorsements. Will you call attention, please, to the endorsements that you refer to as having been presented to you at that time by Otis & Browne?

A. One is what they call a policy form, a new amended form to be attached to the policy, mimeographed, with the [12] office stamp on the corner of Otis & Browne, Incorporated. Another was the attachment of an extended coverage endorsement.

Q. And that form which you have just related is a mimeographed form, is it not, of two pages?

A. Yes, sir.

Q. And I will call your attention to the fact that in the lower left-hand corner of the first page it has "Otis & Browne, Incorporated, Insurance, San Francisco, Los Angeles," is that so?

A. Yes.

Q. And the other document as to the extended coverage endorsement.

A. The other document as to the extended coverage endorsement.

Q. What did they present those endorsements to you at that time for?

A. To be signed and attached to the policy.

Q. And they were attached to such policy?

A. They were.

Mr. Taylor: If your Honor please, I will offer this daily report as defendant's exhibit next in order.

Mr. Hauerken: I will object to the introduction of it, your Honor, it is not evidence. It was

(Testimony of Fletcher Quinn Ritch.)

used merely to refresh this man's recollection of a note he made at the [13] time. It does not amplify his testimony. It is a self-serving document to that extent. He had made an outright statement that a letter was delivered to him. This was used, as I understand it, merely for the purpose of refreshing his recollection——

The Court: Well, I understood the papers were to be attached to the policy.

Mr. Hauerken: That is right, and the policy is in evidence with the attachments.

Mr. Taylor: The endorsements have been attached.

Mr. Hauerken: There is no question about Otis & Browne having presented—Otis & Browne are insurance brokers——

The Court: I am inclined to agree with you, that the memorandum was used for the purpose of refreshing the memory of this witness, and aside from that it would be self-serving. The objection is sustained.

Mr. Taylor: Now, if your Honor please, in furtherance of the stipulation that has been signed and to complete the record and to show the documents that were referred to in that stipulation, that is, the letters requesting termination of the liability by the Merchants that were addressed to Otis & Browne, it has been agreed that there is no necessity for the originals to be produced, and I would therefore like to——

Mr. Hauerken: I have the originals, so we might as well have them. [14]

(Testimony of Fletcher Quinn Ritch.)

Mr. Taylor: All right.

(Mr. Hauerken hands document to Mr. Taylor.)

Mr. Hauerken: Will you give me a copy of it if you have a copy?

Mr. Taylor: Yes; I have one here.

Now, if your Honor please, I would like to offer next in evidence a letter on the letterhead of Merchants Fire Assurance Corporation, pursuant to stipulation, dated April 10, 1946, that was addressed to Otis & Browne, Inc., 233 Sansome Street, San Francisco, California, which reads as follows:

> "Will you kindly cancel this policy and return it to us for pro rata cancellation? The company has requested us to retire from the liability because we are no longer willing to accept this classification. If you would prefer, we can send cancellation notice direct to the assured. However, we will not do so unless you specifically instruct us."

Mr. Hauerken: We object to the relevancy of that document, your Honor. I refer your Honor to the case of Lauman vs. Concordia Fire Insurance Co., in which it was held substantially that a firm whose practice and custom, in relation to the cancellation of insurance policies, is to protect the assured in some other company, if possible, and to notify him of the concellation of his policy by

(Testimony of Fletcher Quinn Ritch.)

either sending him a new policy or advising him that they cannot replace it, and requesting a return of the policy, are mere [15] brokers, and as such are without authority to accept notice of cancellation.

And the case goes on further to say that an agency to procure insurance is ended when the policy is procured and delivered to the principal, and the agent has no power after the policy is so delivered to consent to a concellation, or to accept notice of an intended cancellation by the insurer; and that the evidence of usage to give notice to a broker is inadmissible where the policy requires notice to the insured.

There are a number of cases on that point. I just cited one to show the attempt to cancel through the medium of a broker is legally without effect.

The Court: The objection is overruled.

Mr. Taylor: We offer that letter of April 10th as defendant's exhibit next in order.

(The document referred to was marked Defendant's Exhibit No. B.)

(Testimony of Fletcher Quinn Ritch.)

DEFENDANT'S EXHIBIT B

[Letterhead] Merchants Fire Assurance Corporation of New York.

April 10, 1946.

Otis & Browne, Inc.
233 Sansome St.,
San Francisco, Calif.

Gentlemen:

Re: Policy #8604
Technical Porcelain Co.

Will you kindly cancel this policy and return it to us for pro rata cancellation?

The Company has requested us to retire from the liability because we are no longer willing to accept this classification. If you would prefer, we can send cancellation notice direct to the assured. However, we will not do so unless you specifically instruct us.

Yours very truly,
/s/ H. F. ROHRBACH,
Manager.

HFR:ES

[Notation]: Canc P R 4/10/46.

[Stamped]: Received Otis & Browne, Inc., Apr. 11, 1946.

[Endorsed]: Filed U.S.D.C. Sept. 17, 1947.

Mr. Taylor: Now, if your Honor please, pursuant to the stipulation of facts, we would next like to offer in evidence a letter on the letterhead of Merchants Fire Assurance Corporation of New

(Testimony of Fletcher Quinn Ritch.)

York, under date of May 3d, 1946, which is addressed to Otis & Browne, 233 Sansome Street, San Francisco, California, reading as follows:

> "Re: Policy No. 8604, Technical Porcelain Company.
>
> "We are following up a letter written to you on April [16] 10th asking for cancellation of this policy.
>
> "We understood that you were going to relieve us of liability as soon as possible although no definite date was set for the termination.
>
> "Will you kindly follow this up and endeavor to have our policy returned within the next ten days?
>
> "Yours very truly,
>
> "H. F. ROHRBACH,
>
> "Manager."

At the bottom of that letter in ink is the following notation, which pursuant to the stipulation of facts was made by Otis & Browne on this same letter returned to Merchants: "You may close your file as this has been replaced as of April 10, 1946. Policy is at Mechanics Bank, Richmond, and will require some time to secure unless you wish to send cancellation notice dated ten days prior to April 10, 1946."

That letter, if your Honor please, bears a receipt stamp of Merchants Fire under date of May 7, its date being May 3, 1946.

(Testimony of Fletcher Quinn Ritch.)

Mr. Hauerken: There is no question as to the validity of the document, your Honor.

Mr. Taylor: I am just stating for the purpose of completing the record the marks appearing on the document. It also bears the receipt stamp of Otis & Browne, Incorporated, under date of May 4, 1946, indicating it was received by Otis & Browne the day after it was written and was returned [17] to Merchants by them on May 7th.

I offer that as defendant's exhibit next in order.

The Court: I presume you make the same objection?

Mr. Hauerken: The same objection as to the last document.

The Court: Overruled. Received.

(The document referred to was marked Defendant's Exhibit C.)

DEFENDANT'S EXHIBIT C

[Letterhead] Merchants Fire Assurance Corporation of New York.

May 3, 1946.

Otis & Browne, Inc.,
233 Sansome St.,
San Francisco, Calif.

Gentlemen:

Re: Policy #8604
Technical Porcelain Co.

We are following up a letter written to you on April 10 asking for cancellation of this policy.

We understood that you were going to relieve us

(Testimony of Fletcher Quinn Ritch.)

of liability as soon as possible although no definite date was set for the termination.

Will you kindly follow this up and endeavor to have our policy returned within the next ten days?

Yours very truly,

/s/ H. F. ROHRBACH,
Manager.

HFR:ES

[Stamped]: Received Otis & Browne, Inc., May 4, 1946. Received May 7, 1946. Pacific Dept. M.F.A.C.

[Notation]: You may close your file as this has been replaced as of April 10, 1946. Policy is at Mechanic's Bank, Richmond, and will require some time to secure unless you wish to send cancellation notice dated 10 days prior to April 10, 1946.

[Endorsed]: Filed U.S.D.C., Sept. 17, 1947.

Mr. Taylor: That is all as far as this witness is concerned.

Cross-Examination

By Mr. Hauerken:

Q. Mr. Fitch, will it help you any if I give you this policy, the original policy (handing document to witness)? I want to refer to some dates. I think possibly it may be of some help to you. What is the effective date of that policy of Merchants Fire Insurance? It is on the policy, Plaintiff's Exhibit No. 1. A. June 26, 1944.

Q. Who were the insurance brokers who originally procured that policy from you for the plaintiffs in this case?

(Testimony of Fletcher Quinn Ritch.)

A. It came to us through the general agent, Elmer H. Cords.

Q. Isn't it a fact that the policy was placed with your general agent by an insurance broker in Oakland known as Myer Lightner & Company?

A. Myer Lightner & Company. [18]

Q. So the insurance broker who procured this policy was Myer Lightner and not Otis & Browne?

A. They were the original brokers.

Q. Myer Lightner procured this policy from you for the plaintiffs?

A. No, the Cords agency wrote it over in Oakland.

Q. The Cords Agency was agent of the Merchants Fire Assurance, is that right? A. Yes.

Q. As your agents they accept business from insurance brokers, do they not? A. Yes.

Q. And in this particular case your agents, the Cords Company, received this business from Myer Lightner, insurance brokers, is that not a fact?

A. On the back of the policy there is an interoffice memorandum from Myer Lightner, otherwise I wouldn't know.

Q. But that being on the policy tells us that Myer Lightner were the brokers and Cords were the agents?

A. They were brokers up to the time——

Q. Just answer the question. I am asking at the time the policy was procured.

A. They were the brokers.

Q. Now attached to this policy is this mimeo-

(Testimony of Fletcher Quinn Ritch.)

graphed statement or form which Mr. Taylor referred to, dated February [19] 6, 1945. You saw that form, mimeographed form, did you not?

A. Yes, sir.

Q. That is the form that you referred to when you testified as to the mimeographed form bearing the name of Otis & Brown, Inc.?

A. That is the one.

Q. It is dated February 6, 1945?

A. Right.

Q. Who is the M. C. Brown who signed this for the defendant?

A. A clerk who was attaching the endorsements to the policy, a young lady who is no longer with me.

Q. As you say, on February 7, some one from Otis & Browne presented to you a letter of authorization signed A. A. Pagliero?

A. On or about that date, yes, sir.

Q. Who from Otis & Browne presented that letter to you?

A. As near as I can remember Mr. Browne came in with the letter and the endorsement.

Q. You say as near as you can remember. Do you have a definite recollection or are you just assuming that it must have been——

A. That is over two years ago. There are a hundred brokers——

Q. You can't be sure who presented it?

A. Somebody from his office. [20]

Q. Where is that letter, Mr. Ritch?

A. Mr. Browne took it with him promising to

(Testimony of Fletcher Quinn Ritch.)

mail a copy the next day. He only had one original.

Q. You say Mr. Browne took it with him and yet you are not entirely sure that Mr. Browne is the individual who came in with it, are you?

A. As sure as I can be.

Q. What did that letter say?

A. I don't remember the wording; just a form letter saying Otis & Browne, Incorporated——

Q. Now just a moment. Do you remember the wording or don't you remember the wording?

A. As I remember the exact wording it was just a statement naming a new broker, asking the company to recognize Otis & Browne as its insurance broker.

Q. That is all it said?

A. Well, a few extra words, but that is the common——

The Court: Just that general statement? There was nothing added as to what the authority was, was there?

A. The policy number and everything, asking the company to recognize Otis & Browne, Incorporated, as their insurance brokers.

Q. It had upon it your policy number?

A. Policy number——

Q. This particular policy number? [21]

A. I don't remember whether the policy number was on that letter or not, but——

Q. Well, if it wasn't this policy number what was it?

A. It was a form that came in with the letter and that had the policy number on.

(Testimony of Fletcher Quinn Ritch.)

Q. Was there more than one number?

A. Just one policy number on each endorsement.

Q. (By Mr. Hauerken): Well, this letter that you referred to, was it attached to this endorsement? Was it a letter saying, "Attached find endorsement which we want you to attach to our policy?"

A. No, the letter was, just as I said, asking us to recognize Otis & Browne as their insurance brokers.

Q. And that is all? A. To that effect.

Mr. Hauerken: You are sure of that. That is all.

Redirect Examination

By Mr. Taylor:

Q. Mr. Fitch, do you remember whether in that letter that was exhibited to you at the time these endorsements were exhibited and delivered to you for attachment to this policy there was mentioned anything with respect to the time or period that the party was to recognize Otis & Browne as insurance brokers?

A. Well, the letter named the insurance brokers from that date on. [22]

Q. It said something to the effect from that date on? A. Yes.

Q. I see. Do you remember anything else with respect to what was in that letter?

A. In what way?

Q. Is that about the extent of what was said or do you recall anything else with regard to it?

A. Just asking the Merchants Fire to recognize

(Testimony of Fletcher Quinn Ritch.)

Otis & Browne, Incorporated, as their insurance brokers.

Q. Do you recall whether it was on a letterhead or plain form? A. Recall what?

Q. Whether it was on a letterhead or plain form? A. No, I don't.

Mr. Taylor: You don't. That is all.

The Court: Any further questions?

Mr. Hauerken: No further questions.

The Court: That is all.

Mr. Taylor: That is all, Mr. Tich.

Q. Now, if your Honor please, in connection with the defendant's case that is all of the evidence at the present time. I wish to tender here in court a check of the Merchants Fire Assurance Company in the amount of $209.36 covering the amount of premium as of April 10, 1946, with interest to date. That is all. [23]

Mr. Hauerken: I don't know whether that is offered in evidence or to whom it is tendered or the exact purpose of it, and accordingly I don't know what I should say in response to this particular tender other than if it is tendered to the plaintiffs it is of course rejected.

Mr. Taylor: It is of course tendered to the plaintiffs, tendered in open court.

The Court: Well, it is not an exhibit.

Mr. Hauerken: It is nothing.

The Court: If it is tendered and rejected I assume it should now be returned to counsel that offered it.

Mr. Hauerken: I would like to call Mr. Browne.

EDWARD RAMBO BROWNE

recalled for the plaintiffs, previously sworn.

Direct Examination

By Mr. Hauerken:

Q. Mr. Browne, your firm—I am going to lead on this, if I may, on what I deem to be immaterial.

Mr. Taylor: That is all right.

Q. (By Mr. Hauerken): Your firm caused to be prepared and presented to Merchants Fire Assurance Company this endorsement dated February 6, 1945, is that correct?

A. That is correct.

Q. Did Otis & Browne or you procure this particular Merchants Fire Assurance Company policy originally for the [24] plaintiffs in this case?

A. No.

Q. Now do you recall whether or not you personally, or do you recall who in your firm may have presented this endorsement of February 6, 1945, for the Merchants file?

The Court: First, did you?

A. It is possible, your Honor, that I could have. Of course, it is two years now——

Q. You have no independent recollection of whether you did or did not?

A. I probably did. Let's say for argument's sake that I did. The procedure, if I may tell my story——

The Court: No, confine yourself to answers to questions.

(Testimony of Edward Rambo Browne.)

Q. (By Mr. Hauerken): Now did you or your firm at the time that you prepared and presented this endorsement to the Merchants have a letter from the plaintiffs signed by A. A. Pagliero which you exhibited and showed to the Merchants Fire?

A. What kind of a letter?

Q. Well, a letter——

The Court: You heard it described a few minutes ago, did you not, by Mr. Ritch?

A. No, there was no such letter.

Q. (By Mr. Hauerken): Now with respect to this letter of [25] April the 10th that has been offered into evidence——

And by the way, may I say for the benefit of the court the fire we are talking about happened on May 22.

The Court: That is in the stipulation.

Mr. Hauerken: Yes.

The Witness: Mr. Hauerken, in view of all of these facts I would like to put in a few points if I may——

Mr. Hauerken: No, I think you can't do that——

The Witness: I am sorry.

Mr. Hauerken: You have to answer questions that counsel propound. If your answer is not fully explanatory, of course, I think you have the right to explain.

The Witness: Is there any law that requires me to answer either yes or no to a question?

(Testimony of Edward Rambo Browne.)

Mr. Hauerken: No, you may explain an answer if you feel a yes or no is not completely——

The Court: If the explanation is relevant.

Q. (By Mr. Hauerken): Now I am going to show you a letter dated April 10, 1945, marked Defendant's Exhibit B; when you received that letter did you inform any one at the Technical Porcelain of having received this letter?

A. Is this what is called the first letter?

Q. That is the first letter. Let me change the question. Did you inform any one at the Technical Porcelain of having received this letter at any time prior to the fire? [26] A. No.

Q. Now take the next letter, of May 3d, marked Defendant's Exhibit C, did you at any time inform any one at the Technical Porcelain of the receipt of that letter prior to the fire? A. No.

Q. Did you tell any one at the Technical Porcelain of the fact that you had procured a policy of the Home Fire & Marine Insurance Company in any amount; did you tell them that prior to the fire?

A. No.

Q. When did you tell any one of the Technical Porcelain of having procured a policy from the Home Fire & Marine Insurance Company in a like amount as the Merchants Fire Assurance Company policy?

A. Approximately a week after the fire.

Q. Who did you tell that to?

A. To Mr. Antone Pagliero.

Q. And he is one of the partners in the firm?

(Testimony of Edward Rambo Browne.)

A. So I understood.

Q. What did Mr. Pagliero say when you told him that?

A. Well, he says that adds up to 315,000.

Q. Did he approve of your having cancelled this policy or attempting to cancel the policy of Merchants, or did he disapprove? [27]

Mr. Taylor: Just a moment. Object to that on the ground that it is incompetent, irrelevant and immaterial. It does not make any difference whether the plaintiffs gave any approval at that time or not. The fire had occurred and the rights were determined——

Mr. Hauerken: Let me ask this: Do you reject the theory of ratification?

Mr. Taylor: Not by any means. We contend that the exercise of the rights under this policy was the ratification of the action of the brokers in obtaining the substitute policy.

The Court: Don't you think it is competent and material as to the question of ratification?

Mr. Taylor: Well, I take this view of it, that as far as ratification is concerned it is the rights that were exercised on that policy and not what he told his broker at that time. I take it what counsel is getting at, of course, is the position that the man was taking, his reasons for making claim under the new policy.

The Court: Well, I will receive it. Overruled.

Mr. Hauerken: Will you read the question, Mr. Reporter?

(Testimony of Edward Rambo Browne.)

(Question read.)

The Witness: Do I answer that?

Mr. Hauerken: Yes.

A. He didn't indicate that he wanted the Merchants policy [28] cancelled.

Q. Now, in your dealings with Mr. Pagliero's firm, have you ever cancelled or attempted to cancel any other policies of insurance through a similar procedure as in this case? A. No.

Q. What licenses does your firm hold from the State of California to engage in the insurance business?

A. We hold an insurance broker's license, Lloyd's license, life license, the usual things necessary.

Mr. Hauerken: Is your Honor familiar with the type of licenses under the Insurance Code?

The Court: Yes.

Q. (By Mr. Hauerken): You hold an insurance broker's license? A. Yes.

Q. But no insurance agent's license?

A. Yes, we have an insurance agent's license.

Q. I mean other than life insurance?

A. Yes, we have an insurance agent's license for the Employers Liability Assurance Corporation and the Employers Fire Insurance Company, but none other.

Q. But other than that is your business that of general brokers? A. Yes.

Mr. Hauerken: I think that is all. [29]

(Testimony of Edward Rambo Browne.)

Cross-Examination

By Mr. Taylor:

Q. Mr. Browne, you say that you took over the representation as an insurance broker of the plaintiffs in this case some time in December of 1944?

A. That is approximately correct.

Q. And as the questions have been brought out by Mr. Hauerken, prior to that time as to this particular policy a different broker had acted on it, isn't that so? A. That is true.

Q. And you were substituted in the place of that broker who had issued the policy and handled the plaintiff's insurance, is that correct?

A. Our firm was substituted.

Q. And you handled from and after that time their entire insurance portfolio, did you not?

A. That is true.

Q. It was not an appointment designating you for the issuance or the obtaining of any single policy, is that not so? A. That is true.

Q. As a matter of fact, you recall in this instance as to the premium on this policy as to whether it was paid by you or by the plaintiff to the defendant in this case?

A. The premium was not paid by our office because we did not procure the policy originally. You see, when we took [30] over we merely superimposed what we considered accurate and adequate coverage on an existing contract and there was no financial transaction and it had some time to run,—I think about a year and a half to go.

(Testimony of Edward Rambo Browne.)

Q. The presentation in situations such as you have here where you have taken over an insurance line from another broker—the presentation of letters from the assured under the policy or the policies in the schedule designating you an insurance broker—the presentation of letters to the company or companies on the schedule is a common practice in the insurance business, isn't it?

A. It is not always done. It is sometimes done. Whether it is common or usual I can't say. On this particular risk for this client there are some fourteen or fifteen companies and none of those fourteen or fifteen companies have copies of letters or any other record of presentation of letters from us.

Q. Would you say they had no record of any letters of presentation——

A. They were told that we had taken over and if they wanted to confirm it they could communicate with the original agents or brokers or with the property owner direct.

Q. It would be your recollection that you followed the same course as to all companies on the line and the Merchants the same way? [31]

A. That is true, and we have been in business for many years and my people before me and they have taken our word on these things.

Mr. Taylor: That is all.

Redirect Examination

By Mr. Hauerken:

Q. On the question of the usual practice that

(Testimony of Edward Rambo Browne.)

Mr. Taylor presented, is not the usual practice to secure a letter, why didn't you secure such a letter in this case?

A. The man who had previously handled the insurance in a brokerage capacity was named Meyer Lightner, Incorporated. Mr. Pagliero had a rather unpleasant and unfortunate experience and Meyer Lightner had received from Mr. Pagliero a letter similar to that which is under discussion and he found that his insurance was grossly mismanaged, in accordance with his findings and his opinion, and requested that Mr. Meyer or Lightner retire as his broker and Mr. Lightner refused because of the letter which was a binding contract between Pagliero and Lightner, and in order to get rid of Mr. Lightner Mr. Pagliero had to pay him a considerable sum to get him to relinquish his authority.

Q. As a matter of fact, Lightner sued Mr. Pagliero? A. That is true.

Q. And predicated on that suit, which in turn was predicated on the letter, Mr. Pagliero had to buy his peace? [32]

A. That is true. And in the light of everything that had transpired we felt it was rather bad taste for us to ask for a letter of appointment.

Q. And that is how you know you would have no letter in your file?

A. That is true. I searched my file at the request of Mr. Taylor of Thornton & Taylor and I informed Mr. Taylor that I had found no such letter, and that was quite some time ago.

(Testimony of Edward Rambo Browne.)

Mr. Hauerken: That is all.

The Court: You undoubtedly informed Mr. Ritch that your company had taken over the business as brokers, is that true? A. Yes.

Q. But you did that verbally? A. Yes.

Recross-Examination

By Mr. Taylor:

Q. Mr. Browne, the language used on Defendant's Exhibit No. C, the letter of May 3d, the notation at the bottom of that in pen and ink referring to policy having been replaced, that reference to policy replaced referred to the Home Fire & Marine policy that had been issued in the same amount, did it?

A. True, and I would like to call your attention to the fact that the letter previous to this which this is a followup of stated that if they received word from us to send a [33] cancellation notice they would do so, and this indicates that they may send their cancellation notice.

Mr. Taylor: That is all, your Honor.

Mr. Hauerken: That is all.

The Court: That is all.

ANTONE A. PAGLIERO

called for the plaintiffs, sworn.

Direct Examination

By Mr. Hauerken:

Q. Mr. Pagliero, what insurance broker procured this policy of the Merchants Fire Assurance Corporation for the Technical Porcelain & Chinaware Company? A. Meyer Lightner Company.

(Testimony of Antone A. Pagliero.)

Q. Did Otis & Browne have anything to do with procuring this policy of Merchants?

A. No, sir.

Q. The Technical Porcelain & Chinaware Company is a co-partnership, is that correct?

A. Yes.

Q. And the partners consist of John Pagliero, your father; Arthur Pagliero, your brother; and yourself, is that correct? A. Yes.

Q. Is your father rather elderly? A. Yes.

Q. And your brother is younger than you? [34]

A. Yes, sir.

Q. Who is actively in charge of the operations of the company?

A. I have been since 1922.

Q. And who has been actively in charge of matters of insurance?

A. I have been, sir. Due to our past experience on a fire we had—I think the first small fire we had was in 1937—so I had been fully responsible for all insurance policies.

Q. As a result of that fire in 1937 you became quite insurance-minded? A. Yes, sir.

Q. Realizing the importance of it? A. Yes.

Q. Now did your company ever receive any notice of cancellation of the Merchants Fire Assurance policy? A. We have not.

Mr. Taylor: Just a moment. Your Honor, there is no issue as to that. This would be irrelevant.

The Court: Overruled.

(Testimony of Antone A. Pagliero.)

The Witness: We haven't as yet, to this date, sir.

Q. (By Mr. Hauerken): Did you ever given any one authority to accept cancellation of any policy of insurance? A. No. [35]

Mr. Taylor: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. No, sir.

Q. (By Mr. Hauerken): Did you ever give any one authority to accept the cancellation of the Merchants Fire Assurance policy? A. No, sir.

Mr. Taylor: Same objection, if your Honor please, and on the ground it calls for an opinion and conclusion of the witness.

The Court: Sustained on that ground, it calls for a conclusion.

Mr. Hauerken: If your Honor please, I think he testified he handled all the insurance policies in the firm. He would know whether or not he ever gave any one authority.

The Court: Well, it is a conclusion as to whether or not he did, but what he said or what he wrote would be the evidence on which the Court would draw the conclusion.

The Witness: Pardon me, I don't think I understand that.

Q. (By Mr. Hauerken): That is all right. We will bring that out. When were you notified by Mr. Browne of the fact of his having received some correspondence from the Merchants Fire and that

(Testimony of Antone A. Pagliero.)

another policy in a similar amount had been [36] taken out?

A. I would say about a week or ten days after our fire of May 22, 1946.

Q. What did you say when Mr. Browne told you about that?

Mr. Taylor: Objected to, if your Honor please, on the ground it is hearsay and incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hauerken): Did you approve of any cancellation of the Merchants policy?

A. No, sir.

The Court: You had heard nothing about these letters that have been referred to prior to the time of the fire? A. No, sir.

Q. (By Mr. Hauerken): And when you did you took the matter up with me?

A. I took the matter up with my attorney, Mr. Hauerken.

Q. And asked me what your legal rights in the matter were? A. That is right, sir.

Q. And that was after the fire?

A. Yes, sir.

Q. You never returned the policy to the company but kept it either in your possession or my possession at all times after the fire? [37]

A. Yes, sir.

Q. Did you ever give Otis & Browne a general authority to handle your insurance to do as they saw fit?

(Testimony of Antone A. Pagliero.)

Mr. Taylor: Just a moment. Objected to upon the ground it is incompetent, irrelevant and immaterial, leading and suggestive, and calling for an opinion and conclusion of the witness.

The Court: It is both leading and suggestive and calling for a conclusion. Sustained.

Q. (By Mr. Hauerken): Did you ever give Otis & Browne any writing with respect to your insurance?

A. No, sir, for the simple reason of the experience we had with Myer Lightner Company and the suit we had with Myer Lightner Company.

Q. Myer Lightner were your previous brokers?

A. That is right.

Q. And you had given them some sort of a letter?

A. That is right, appointing them as exclusive brokers, and we had some misunderstanding on that, so I in turn took it upon myself that I would never give anybody exclusive broker rights.

Q. And Myer Lightner sued you?

A. That is right.

Q. And we compromised that suit?

A. That is right. [38]

Q. And that is the reason you wouldn't give any letter to Otis & Browne or any one else?

A. That is right, sir.

Mr. Haurken: That is all.

Mr. Taylor: No questions.

Mr. Hauerken: That is our rebuttal on the affirmative defense.

The Court: Both sides rest now?

Mr. Taylor: Yes, your Honor.

Mr. Hauerken: May I suggest this, your Honor: There are a number of cases that touch upon this point and I think that perhaps better law work and better assistance can be given to the Court if briefs were filed, and I suggest that to you.

Mr. Taylor: Whatever suits your convenience, your Honor, I am prepared to do.

The Court: Well, of course you gentlemen have gone in this and the law involved as I have not had the opportunity to do, and I would like to have the advantage of what efforts you have made. If you think you can do it more advantageously by Memorandum, it is satisfactory to me.

(Thereupon, after further discussion, the matter was ordered submitted on briefs 10, 10 and 5, Mr. Taylor to have the opening and closing.) **[39]**

Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing 39 pages comprise a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: No. 11831. United States Circuit Court of Appeals for the Ninth Circuit. Antone A. Pagliero, John B. Pagliero and Arthur J. Pagliero, Copartners, Doing Business Under the Fictitious Firm Name and Style of Technical Porcelain & Chinaware Company, Appellants, vs. Merchants Fire Assurance Corporation of New York, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11831

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, copartners Doing Business Under the Fictitious Firm Name and Style of TECHNICAL PORCELAIN & CHINAWARE COMPANY,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK, a Corporation,

Appellee.

APPELLANTS' DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION AND TO BE PRINTED

In accordance with the provisions of Rule 19 (6) of the Rules of the above-entitled Court, appellants Antone A. Pagliero, John B. Pagliero and Arthur J. Pagliero, copartners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company, hereby designate as the parts of the record necessary for consideration and to be printed each and every part, with the exception hereinafter noted, of the record certified to the above-entitled Court by the Clerk of the United States District Court, in and for the Southern Division of the Northern District of California, and designated in Appellants' Designation of Por-

tions of Record, Proceedings, and Evidence to be Contained in Record on Appeal heretofore filed with the Clerk of the United States District Court, in and for the Southern Division of the Northern District of California.

Of the four original exhibits certified to the above-entitled Court by said Clerk, the following only are hereby designated as part of the record necessary for consideration and to be printed:

(1) The following portion of plaintiffs' Exhibit No. 1:

> "Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time."

(2) Defendant's Exhibit B.

(3) Defendant's Exhibit C.

In addition to said record appellants further designate as part of the record necessary for consideration and to be printed.

(1) This Designation.

(2) Appellants' Statement of Points Relied Upon On Appeal filed in the above-entitled Court.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Appellants.

Receipt of a copy of the foregoing Designation is hereby admitted this 14th day of January, 1948.

THORNTON & TAYLOR,
Attorneys for Appellee.

[Endorsed]: Filed Jan. 14, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' STATEMENT OF POINTS RELIED UPON ON APPEAL

Appellants Antone A. Pagliero, John B. Pagliero and Arthur J. Pagliero, copartners, doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company, refer to points (1) to (5), inclusive, of Appellants' Statement of Points Relied Upon On Appeal heretofore filed with the Clerk of the United States District Court, in and for the Southern Division of the Northern District of California, and certified to the above-entitled Court by said Clerk as part of the record on appeal, and adopt the same as their Statement of Points Relied Upon on Appeal in accordance with the provisions of Rule 19 (6) of the Rules of the above-entitled Court.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Appellants.

Receipt of a copy of the foregoing Statement Of Points is hereby admitted this 14th day of January, 1948.

THORNTON & TAYLOR, AM,
Attorneys for Appellee.

[Endorsed]: Filed Jan. 14, 1948.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION, APPLICATION FOR ORDER, AND ORDER DISPENSING WITH PRINTING OF EXHIBIT

Whereas various exhibits were introduced in evidence at the trial of the above-entitled action in the District Court of the United States, in and for the Southern Division of the Northern District of California; and

Whereas said exhibits were transmitted in their original form by the Clerk of said District Court to the Clerk of the above-entitled Court as part of the record on appeal in said action; and

Whereas plaintiffs' and appellants' Exhibit No. 1, being the insurance policy upon which said action was brought, is composed of:

(1) The printed California Standard Form Fire Insurance Policy, and

(2) Various printed and/or mimeographed and/or typewritten endorsements; and

Whereas it is deemed by the parties hereto that the effect, relationship and relative importance of the various clauses and endorsements of said policy will be made clearer to the above-entitled Court by an examination of the original of said policy than by an examination of a printed copy thereof:

Now, Therefore, it is hereby stipulated by and between the parties hereto, through their respective counsel, that no part of plaintiffs' and appellants'

Exhibit No. 1 need be printed into the record on appeal, and that the whole of said Exhibit may, in its original form, be deemed a part of the record on appeal which will be considered by the above-entitled Court for the purpose of the determination of the appeal in said action.

Pursuant to the foregoing Stipulation, the parties thereto hereby respectfully apply for an Order dispensing with the printing of said Exhibit No. 1 and in lieu thereof making the whole of said Exhibit, in its original form, a part of the record on appeal which will be considered by the above-entitled Court for the purpose of the determination of the appeal in said action.

Dated: San Francisco, California, this 28th day of January, 1948.

/s/ GEORGE H. HAUERKEN,
HAUERKEN, AMES &
ST. CLAIR,
Attorneys for Appellants.

/s/ EVANS M. TAYLOR,
/s/ THORNTON R. TAYLOR,
Attorneys for Appellee.

It Is So Ordered.

Dated: San Francisco, California, this 28th day of January, 1948.

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed Jan. 29, 1948.